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No. 94-1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JERSEY CENTRAL POWER & LIGHT COMPANY,

Petitioner,

vs.

FREEHOLD COGENERATION ASSOCIATES, L.P.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Through the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Congress sought to encourage the development of qualifying cogeneration facilities ("QFs") by compelling electric utilities to purchase power from QFs and by exempting QFs from certain "State laws and regulations respecting the rates, or . . . the financial or organizational regulation, of electric utilities." 16 U.S.C. § 824a-3(a), (e)(1). However, to protect utilities and their ratepayers from subsidizing the cogeneration industry, Congress placed an absolute ceiling on the rate that a utility could be forced to pay to a QF. 16 U.S.C. § 824a-3(b). Congress compelled the States to implement PURPA. 16 U.S.C. § 824a-3(f). Through PURPA § 210(g), Congress severely limited the jurisdiction of the federal courts to resolve disputes over PURPA's implementation; the States were directed to "adjudicate disputes arising under the statute." *FERC v. Mississippi*, 456 U.S. 742, 760 (1982).

Against this background, the questions presented by this case are:

> (1) Whether PURPA § 210(e) preempts a State regulatory agency from conducting a proceeding to determine if it should modify its own prior order requiring an electric utility (and, indirectly, its customers) to pay to a QF a rate in excess of the maximum rate permitted by PURPA § 210(b), particularly where (i) the State agency was adjudicating a dispute initiated by the petition of the QF and (ii) the agency's power to modify its own order was expressly contemplated by both State statute and the contract between the QF and the utility; and
>
> (2) Whether the federal courts have jurisdiction to enjoin such an ongoing proceeding before a State regulatory authority in the face of PURPA § 210(g)'s ban on district court review of the States' case-by-case implementation of PURPA and Congress's mandate that the States "adjudicate disputes arising under the statute."

LISTING OF THE PARTIES AND RULE 29.1 STATEMENT

Jersey Central Power & Light Company ("JCP&L"), the petitioner, is a wholly-owned subsidiary of General Public Utilities Corporation. JCP&L has no non-wholly-owned subsidiaries.

The Board of Public Utilities of the State of New Jersey (formerly known as the Board of Regulatory Commissioners of the State of New Jersey) was a defendant-appellee, along with JCP&L, in the proceeding below, but it has not petitioned for this Court's review of the Third Circuit's ruling. The New Jersey Division of the Ratepayer Advocate was an intervenor-appellee before the Third Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jersey Central Power & Light Company ("JCP&L") respectfully asks that a writ of certiorari issue to review the judgment and opinion (the "Opinion") of the United States Court of Appeals for the Third Circuit entered on January 9, 1995.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. A-1 - A-29) is reported at 44 F.3d 1178 (1995). The opinion of the District Court (App. A-30 - A-38) was not officially reported, but can be referenced as Civ. No. 94-0375 (MLP) (D.N.J. March 18, 1994).

JURISDICTION

The Opinion was issued on January 9, 1995. The Court of Appeals denied JCP&L's timely Petition for Rehearing by Order dated March 7, 1995 (App. A-29). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Pertinent provisions of PURPA, 16 U.S.C. §§ 824a-3 and 2633, and certain relevant regulations thereunder, 18 C.F.R. §§ 292.304(a), (d) and 292.602(c), are reproduced below (App. A-39 - A-49).

STATEMENT OF THE CASE

This case involves a dispute between a developer of a proposed cogeneration facility, on the one hand, and, on the other hand, an electric utility and the State administrative agency empowered to regulate the affairs of such utilities in New Jersey. The Board of Public Utilities of the State of New Jersey (the "Board"), acting pursuant to PURPA and the Board's own implementing regulations thereunder, imposed upon JCP&L the obligation to enter into a long-term contract for the purchase of electric energy and capacity to be generated at a facility proposed (but not yet built) by respondent Freehold Cogeneration Associates, L.P. ("Freehold"). The Board later commenced a fact-finding proceeding — in response to Freehold's petition for approval of a voluntary and unilateral amendment of the contract and under New Jersey statutory law — to determine whether to revoke or modify its order approving the Freehold/JCP&L contract. Among other things, the Board was considering whether (and to what extent) Freehold's prices exceeded JCP&L's avoided cost — the maximum rate that can be charged under PURPA § 210(b).

Over two months after initiating the Board proceeding, Freehold commenced a federal district court action, seeking to enjoin the Board from continuing to adjudicate the parties' dispute. After the District Court dismissed Freehold's complaint for lack of jurisdiction, the Third Circuit reversed, holding not only that federal jurisdiction existed, but also that

PURPA preempted the Board from conducting any proceeding to consider the modification or revocation of its own prior order. Through this petition, JCP&L seeks this Court's review of those determinations.

1. The statutory and regulatory setting

PURPA was part of a package of legislation designed to combat the nationwide energy crisis extant in 1978. Section 210, Title II, of PURPA, 16 U.S.C. § 824a-3, was intended to encourage cogeneration and small power production facilities.[1] Congress sought to accomplish that goal by: (i) overcoming the reluctance of electric utilities to purchase power from non-traditional facilities; and (ii) relieving cogenerators from some of the regulatory burdens imposed on traditional electric utilities by the States.

In order to solve the first of these perceived problems, Congress directed the Federal Energy Regulatory Commission ("FERC") to prescribe "such rules as it determines necessary to encourage cogeneration," including rules to require electric utilities to purchase electric energy from qualifying cogeneration facilities ("QFs"). 16 U.S.C. § 824a-3(a). Congress addressed the second issue by directing FERC to prescribe rules exempting QFs from certain laws governing the rates or financial affairs of electric utilities "if [FERC] determines such exemption is necessary to encourage cogeneration." 16 U.S.C. § 824a-3(e)(1).

At the same time, Congress guaranteed that electric utilities and their retail customers would not be forced to subsidize the cogeneration industry. Thus, PURPA § 210(b) requires that the "rules prescribed under subsection (a) . . . shall insure that" the rates paid by utilities for the purchase of power from QFs shall be "just and reasonable to the electric consumers of the electric utility and in the public interest." Congress went farther, prohibiting FERC from prescribing any rule that

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[1] A cogeneration facility produces both electric energy and steam or some other form of useful energy, such as heat. 16 U.S.C. § 796(18)(A).

would "provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b). The incremental cost of alternative electric energy is commonly referred to as the utility's "avoided cost."

Congress made clear its intent to limit PURPA's intrusion on State prerogatives in the regulation of electric utilities. PURPA § 210(f) provides that "each State regulatory authority shall . . . implement [FERC's rules under § 210(a)] for each electric utility for which it has ratemaking authority." Congress also declared that there shall be no federal court jurisdiction over any claim "respecting any proceeding conducted by a State regulatory authority . . . for purposes of implementing any requirement of a rule under subsection (a)." 16 U.S.C. § 824a-3(g)(1).

FERC adopted regulations relating to purchases and sales of electricity to and from cogeneration facilities. FERC first confirmed that no electric utility need "pay more than [its] avoided cost" for QF energy. 18 C.F.R. § 292.304(a)(2). Then, it set a rigid precondition to a QF's ability to impose upon a utility the obligation to purchase energy *at* that maximum statutory rate—a QF must incur a "legally enforceable obligation" to deliver power before it enjoys the option to insist that a utility pay rates for its energy "based on either: (i) The avoided costs calculated at the time of delivery [of energy]; or (ii) The avoided costs calculated at the time the [legally enforceable] obligation is incurred." 18 C.F.R. § 292.304(d)(2).

FERC's regulations honored Congress's desire to vest in the States significant discretion over the method of implementation and reiterated Congress's demand that State commissions "undertak[e] to resolve disputes between qualifying facilities and electric utilities." *See* 18 C.F.R. § 292.401(a) (1980). In its analysis of the regulations, FERC "recognize[d] that economic and regulatory circumstances vary from State to State and utility to utility"; it therefore sought to "provid[e] an opportunity for experimentation by the States" to allow for the "development of . . . difficult rate principles." *Small*

Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12,214, 12,231 (Feb. 25, 1980) (hereinafter, "*FERC Analysis*"); *id.* at 12,216 (the requirement to implement "may be accomplished by the issuance of regulations, on a case-by-case basis, or by any other means reasonably designed to give effect to the . . . rules"). Moreover, FERC made clear that the State "obligation to implement . . . is a continuing obligation." *Id.* at 12,231.

2. New Jersey's implementation of PURPA; the Board compels JCP&L to contract with Freehold

In October 1981, the Board entered an order designed to commence New Jersey's implementation of PURPA (J.A. 519-31).[2] The Board noted that the purchase price of energy from QFs must not "affect the bills of all other utility customers" (J.A. 520) and announced its intention "to track the cost of QF energy as closely as possible" (J.A. 522, 528).

To obtain contracts, QFs were required to "negotiate with the electric utilities of the State of New Jersey to determine an appropriate payment for their delivered energy and capacity" (J.A. 523). All such agreements were "subject to Board review and approval" on a case-by-case basis (*id.*). The preexisting procedural rules applicable to this contract-specific implementation scheme vested in the Board the authority (i) "at any time [to] order a rehearing and extend, revoke or modify an order made by it," (ii) to "[i]nvestigate upon its own initiative . . . any matter concerning any public utility," and (iii) to ensure that JCP&L's rates were "just and reasonable." N.J. Stat. Ann. 48:2-40, 48:2-19, 48:2-21 (West 1994).

Although the Board, in 1988, modified its PURPA implementation methodology, it granted, in a July 1989 order, Freehold's request to be governed by the prior case-by-case

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[2] This and similar references are to the Joint Appendix in the Court of Appeals.

system.[3] The Board found at that time that the parties' "negotiations had not [yet] resulted in a firm pricing agreement" (J.A. 111); in other words, Freehold had not incurred a "legally enforceable obligation" to deliver energy or capacity to JCP&L (*see* J.A. 8, 111). The Board nevertheless ordered JCP&L to continue negotiating with Freehold and ruled that "any pricing arrangement that results from further negotiations will be assessed against . . . JCP&L's [1988] forecast of its avoided cost" (J.A. 111).[4]

In March 1992, almost three years after the Board ordered JCP&L to continue discussions with Freehold, a contract (the "PPA") was executed (J.A. 15-106, 308). Freehold first incurred a "legally enforceable obligation" to deliver energy and capacity to JCP&L within the meaning of 18 C.F.R. § 292.304(d)(2) when the Board approved the PPA, including Freehold's prices, in a July 8, 1992 order (the "Approval Order") (J.A. 34, 98, 113-17). Despite the fact that PURPA thus entitled Freehold only to rates equal to JCP&L's 1992 avoided cost, the PPA provides for Freehold to charge a rate for its energy and capacity equivalent to 100% of JCP&L's 1988 avoided cost forecast (J.A. 8, 868-69). Because they were based on stale data, Freehold's prices exceeded — by approximately $165 million, net present value — JCP&L's

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[3] In September 1988, the Board adopted a Stipulation of Settlement ("SOS") incorporating new "policies by which [New Jersey's] electric utilities would implement the requirements of section 210 of . . . PURPA" (J.A. 181, 185-86). Under the SOS, each New Jersey utility, including JCP&L, would obtain needed capacity from QFs through a public bidding process (J.A. 187). Initially, the Board ruled that Freehold would be "subject to the new policies" set forth in the SOS (J.A. 533-34), but it later granted Freehold's petition for reconsideration (J.A. 108-111).

[4] At times, all parties have stated that the Board's benchmark, and the parties' subsequent contract, were based on JCP&L's 1989 avoided costs. That is imprecise. The relevant forecast was prepared by JCP&L in October 1988; it later became the benchmark for a 1989 competitive solicitation, which resulted in QF contracts priced materially below the forecast. For the sake of consistency and accuracy, 1988 will be used exclusively herein in this context.

most recent avoided cost forecast as of July 1992, when the Board approved the PPA (J.A. (Supp.) AA-24 - AA-25). This discrepancy was the ultimate effect of the Board's July 1989 order compelling JCP&L to contract with Freehold at rates reflecting JCP&L's 1988 long-term avoided cost forecast (J.A. 8, 651, 697, 811, 868).[5]

The PPA includes a "regulatory out" clause. The parties agreed that their contractual relationship would be expressly conditioned on JCP&L's "continuing ability to timely and fully recover from its customers all . . . costs and charges paid to [Freehold] . . . for energy and capacity throughout the term [of the PPA]" (J.A. 99). The parties specifically recognized that the Board or FERC could "disallow in whole or in part or otherwise impair the full and timely recovery by [JCP&L] from its customers of any energy and capacity payments made or to be made to [Freehold]" (*id.*). And, in the event of any such subsequent impairment of JCP&L's ability to pass through to its ratepayers Freehold's charges under the PPA, the parties expressly agreed that they either would "reduce the rates to be paid by [JCP&L] . . . to such rates as the [Board] . . . shall have authorized [JCP&L] to recover" or would terminate the PPA without further liability on the part of either party (*id.*).[6]

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[5] Indeed, the Board later acknowledged that it erred in imposing on JCP&L rates in excess of JCP&L's avoided cost at the time Freehold first incurred a legally enforceable obligation. *See* Petition And Appendix Of Defendant-Appellee Board Of Regulatory Commissioners Of The State Of New Jersey For Rehearing, With Suggestion For Rehearing *In Banc*, dated January 23, 1995, at 8 ("the PPA entered into and approved by the Board in 1992 provided for a rate which was in excess of the maximum rate authorized by PURPA"); *id.* at 9 (the Board "approved . . . a rate in excess of the Section 210(b) PURPA maximum rate . . . as a result of error").

[6] The PPA further provides that the rates to be paid by JCP&L to Freehold "shall automatically . . . be modified to reflect such rates as shall have been approved by the [Board] . . . and which the Board shall have permitted [JCP&L] timely and fully to recover" if the parties failed within sixty days to reach a negotiated agreement on reduced rates (J.A. 100).

Finally, Freehold submitted to the jurisdiction of the Board to resolve any disputes arising under the PPA (J.A. 105).

On April 12, 1993, the Board, in its continuing implementation of PURPA, entered its so-called Towner Order, which directed all electric utilities in New Jersey to assess existing power purchase contracts with QFs and to report to the Board's Staff concerning the continued economic justification for such contracts (J.A. 215-23). The Board specifically requested that the utilities identify any candidates for buy-out "or other remedial measures" (J.A. 223).

Obeying the Towner Order, JCP&L advised the Board that Freehold was a potential buy-out or restructuring prospect (J.A. 254, 293-95). The Freehold project was in a preparatory stage of development: no construction activity had taken place; construction financing had (and still has) not been obtained (*see* J.A. 317, 444). Most importantly, the project entailed enormous economic disbenefits to JCP&L's customers. By May 1993, Freehold's prices exceeded JCP&L's most current avoided cost forecast by as much as $250 million, net present value (J.A. 295).

3. Freehold initiates a proceeding before the Board, which begins to adjudicate the parties' dispute

To forestall application to it of the Towner Order, Freehold filed a Verified Petition (the "Petition") with the Board in November 1993, requesting the Board to "approve . . . certain modifications to the [PPA]" and to the Approval Order (J.A. 307, 318). Freehold's Petition proposed a minor reduction of the PPA's rates, in return for substantial non-price contract modifications (J.A. 313-19). JCP&L asserted a counterclaim to the Petition, requesting, *inter alia*, that the Board promptly commence a proceeding under N.J. Stat. Ann. 48:2-40 to determine if the Approval Order should be modified or revoked in light of Freehold's excessive rates (J.A. 359-61).

By an oral decision announced on November 24, 1993, confirmed by a written Order dated January 5, 1994, the Board found that, even with Freehold's unilateral "concessions," the

PPA's pricing would be "far in excess of current avoided cost forecasts" (J.A. 141). Indeed, under Freehold's proposal, the economic disbenefits to JCP&L's ratepayers had risen to a net present value of $350 million, based on the $1.145 billion excess of Freehold's suggested new prices over JCP&L's then-current avoided cost (*id.*). Thus, in response to JCP&L's counterclaim, the Board ordered the parties to negotiate in good faith toward a modification or buy-out of the PPA (*id.*). The Board ruled that, if such efforts failed, it would "commence an evidentiary proceeding, pursuant to *N.J.S.A.* 48:2-40, *to consider what actions, if any, should be taken . . . including modification or revocation of its* [*Approval*] *Order*" (*id.* (emphasis added)).

The parties negotiated and reached an impasse (J.A. 162). Freehold then raised for the first time, and the Board began considering, the argument that the Board was preempted by PURPA from ordering negotiations or modifying its Approval Order (*see* J.A. 162, 585-86). Reserving decision on the preemption issue, the Board commenced the fact-finding phase of its proceeding (J.A. 586, 632-40). While participating in that proceeding, Freehold, invoking 28 U.S.C. § 1331, initiated a parallel federal district court action to enjoin the Board from considering the modification or revocation of its Approval Order. Due to the Opinion, the Board never finished its proceeding.

4. The decision of the District Court

On March 18, 1994, the District Court dismissed Freehold's complaint on JCP&L's motion, holding that both PURPA § 210(g)(1) and the Johnson Act, 28 U.S.C. § 1342, deprived it of subject matter jurisdiction over this lawsuit (App. A-38).[7] The District Court concluded that the language and intent of PURPA § 210(g)(1), as amplified by FERC's interpretive statements, mandate a severe restriction on

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[7] The District Court also found jurisdiction to be lacking because the parties expressly agreed that the Board would have continuing jurisdiction over disputes under the PPA (App. A-37 - A-38).

federal jurisdiction (App. A-34 - A-35). Because Freehold was not challenging a determination by FERC, its complaint belonged in State court (App. A-35). Thus, the District Court did not reach JCP&L's other grounds for dismissal, nor did it address the merits of Freehold's motion for summary judgment.

5. The decision of the Court of Appeals

At the outset, the Court of Appeals found that Freehold's obligations under the PPA "commence[d]" on July 8, 1992 (App. A-4). The Court next found that "JCP&L is to pay Freehold 100% of JCP&L's 1989 avoided cost for the purchase of electrical power" (*id.*). The Court never returned to this topic in its Opinion; it failed even to note that JCP&L's avoided cost in July 1992 was far less than that forecast in 1988, and it never confronted PURPA's mandate that payments from a utility to a QF may not exceed 100% of the avoided cost at the time the QF incurs a legally enforceable obligation to deliver power to the utility.

Instead, the Court moved on to the jurisdictional question. It held that PURPA § 210(g) "is more limited in scope than the district court believed" and "applies only to review of proceedings by state regulators . . . designed *to implement any requirement of rules promulgated by the FERC* pursuant to Section 210(a)," which "requires utilities to purchase energy from . . . qualifying facilities at certain prices" (App. A-8) (emphasis in original). On the other hand, the Court concluded that § 210(g) does not preclude federal jurisdiction over challenges to State action "under section 210(e) and supporting regulations" (A-9).

Despite the fact that the Board's proceeding was all about the price at which JCP&L had to purchase Freehold's energy (J.A. 141, 161, 313-15) — and despite its own finding that "Freehold clearly relied upon FERC's rules implemented under section 210(a) in arguing that the [Board's] actions were preempted" (App. A-9) — the Court found that Freehold's "pleadings reasonably can be read to assert a claim that the [Board] proceeding is inconsistent with and preempted by

section 210(e)" (*id.*). Accordingly, the Court held: "Because Freehold is essentially claiming that the [Board] is subjecting it to regulations precluded by section 210(e), the jurisdictional limitations of sections [sic] 210(g)(1) . . . are not relevant to the district court's jurisdiction" and "it was error to dismiss Freehold's complaint" (A-10).

Later, the Court turned to the "merits" of Freehold's claim — *i.e.*, "whether PURPA preempted the [Board] order . . . directing the parties . . . to negotiate an appropriate buyout of the PPA, failing which the [Board] would and did commence proceedings" to consider modifying its prior Approval Order (App. A-20).[8] The Court noted that "the application of the preemption doctrine requires a determination of congressional intent in enacting a federal law" (App. A-21). To ascertain that intent, the Court surveyed PURPA's substantive provisions, including §§ 210(a), (b), and (f), as well as certain FERC regulations addressing, *inter alia*, "the cost to be paid to the QF" by the utility (App. A-22 - A-24).

After discussing the "interplay" among PURPA's several provisions (App. A-23), the Court ruled that the Board's

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[8] Before turning to the merits, the Court rejected certain additional jurisdictional and prudential grounds for dismissal that had been raised by JCP&L and the Board, but were not reached by the District Court, including various abstention doctrines and principles of comity and judicial efficiency (App. A-14 - A-15). The Court also reversed the District Court with respect to the Johnson Act and the contractual support for dismissal (App. A-10 - A-14).

When the Court proceeded to the merits, it commented that "[t]he parties ha[d] fully and repeatedly briefed" the § 210(e) preemption issue and that JCP&L had raised no contractual defenses to Freehold's claim (App. A-19 - A-20). These statements are incomprehensible, given that the merits had not been reached below, the parties had not created an evidentiary record, and JCP&L had not even filed an answer. Moreover, because Freehold rested its entire preemption argument on PURPA §§ 210(a), (b), and (f) and FERC's regulations thereunder — and did not focus on the claim of "utility-type" regulation — JCP&L's "full[]" briefing on the § 210(e) issue consumed one paragraph of its 48-page brief to the Third Circuit.

"implementation of FERC's section 210(a)-type regulations ended" with its July 1992 Approval Order (App. A-24). The Court thus brushed aside, without comment, (i) FERC's mandate that implementation be a "continuing" process, (ii) New Jersey's decision to create a case-by-case implementation system governed by a statutory scheme permitting Board reconsideration "at any time," and (iii) the fact that the Board was adjudicating Freehold's Petition to modify the Approval Order and the PPA's rate structure. Eschewing these specifics in favor of a vague reference to "the overall scheme of PURPA and its stated goal," the Court held: "The present attempt to either modify the PPA or revoke [Board] approval is 'utility-type' regulation — exactly the type of regulation from which Freehold is immune under section 210(e)" (App. A-24).[9]

REASONS FOR GRANTING THE WRIT

This case poses questions of vital import to this Nation's public utilities, their customers, and the State agencies empowered to oversee their activities. Tens of billions of consumer dollars hang in the balance, as does the States' continued ability to play their traditional (or any) role in the regulation of utilities and the protection of ratepayers. The Opinion dramatically restricts the States' ability to cope with the most pressing issue now confronting the industry and its regulators — the Congressionally-instigated move to a competitive market for electrical energy and the concomitant need to cope with overpriced, anticompetitive QF contracts. Ironically, the Third Circuit curtailed State authority at a time when Congress and FERC are demanding increased levels of State input.

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[9] In its summary, the Court broadened its ruling so as to encompass far more than the Board's order commencing a proceeding: "[W]e hold that once the [Board] approved the power purchase agreement between Freehold and JCP&L . . ., any action or order by the [Board] to reconsider its approval or to deny the passage of those rates to JCP&L's consumers under purported state authority was preempted by federal law" (App. A-28 - A-29).

The Court of Appeals decided several important questions of federal law in a way that conflicts with the language of the relevant statute, as well as applicable decisions of this Court, other courts of appeals, and FERC. The Court expanded the preemptive scope of PURPA § 210(e), rather than confining the express preemption of State "utility-type" regulation to its intended, narrow parameters, as required by this Court's decision in *Cippolone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617-18 (1992). The Court also imposed an unwarranted, cramped construction on PURPA § 210(g) and overrode Congress's direction that the States must resolve all disputes under PURPA, thus effectively federalizing litigation under the statute and refuting this Court's decision in *FERC v. Mississippi*. In its most perverse aspect, the Opinion immunizes from Board review or correction a conceded violation of PURPA § 210(b) — *i.e.*, the imposition of a QF price in excess of the maximum rate that can be imposed on a utility and its customers — and, thus, conflicts with this Court's decision in *American Paper Institute, Inc. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 413 (1983).

This Court recently overturned a broad reading of ERISA's express preemption of "all State laws [that] . . . relate to any employee benefit plan" on the ground that the proffered interpretation would have rendered another statutory provision nugatory and "would have left States without the authority to do just what Congress was expressly trying to induce them to do by enacting the [statute]." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1682 (1995) (hereinafter, "*Blue Cross*"). That is exactly what the Opinion does; it forbids the State Board from adjudicating a dispute Congress directed it to adjudicate and renders nugatory both the price ceiling imposed by PURPA § 210(b) and the jurisdictional restriction of PURPA § 210(g). Accordingly, this case is a proper subject for this Court's review.

1. The importance of this case

The economic implications of the Opinion are staggering. This PPA alone will cost New Jersey utility customers

approximately $1.2 billion more than they would otherwise pay for alternate sources of energy (J.A. 141, 352). Nationwide, it is estimated that overpriced QF contracts will add approximately $38 billion, net present value, of excess costs to the price consumers pay for electricity. *See* 141 Cong. Rec. S5448-49 (daily ed. April 7, 1995) (statement of Sen. Nickles); *see also* Jeff Bailey, *Carter-Era Law Keeps Price Of Electricity Up In Spite Of Surplus* (hereinafter, "*Surplus Electricity*"), Wall St. J., May 17, 1995, at A1 ("the hundreds of power plants qualified under PURPA now represent, in effect, a $37 billion roadblock to lower electricity prices").

By declaring overpriced QF contracts off-limits to State regulators, the Third Circuit has locked in this multi-billion dollar windfall for QFs and has directly countermanded one of PURPA's core principles. PURPA was "enacted on the assumption that it would not increase the price of electricity to consumers." 141 Cong. Rec. S5448-49 (daily ed. April 7, 1995) (statement of Sen. Nickles); *see Middle South Services, Inc.*, 33 FERC ¶ 61,408, at 61,788 (1985) ("the intent of [PURPA] section 210 and . . . [FERC's] regulations, . . . is that utilities should be no worse off financially as a result of qualifying facility purchases"). That assumption will prove false — and Congress's initiative will be defeated — if this Court fails to act.

Aside from the multi-billion dollar tax it imposes on electric consumers, the Opinion wreaks havoc with Congress's (and FERC's) current agenda for the utility industry. Through recent legislation, Congress is seeking to create an increasingly competitive environment in the utility industry. Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776 (1992). Regulated utilities cannot — and should not have to — face that competition while burdened by excessive QF rates. *See Southern California Edison Co.*, 70 FERC ¶ 61,215, at 61,675-76 (1995) ("As the electric utility industry becomes increasingly competitive, the need to ensure that the States are using procedures which ensure that QF rates do not exceed avoided cost becomes more critical"); *Surplus Electricity*, at A1 ("Many utilities are thus highly vulnerable to competition,

as state and federal officials begin to map out deregulation of the $200 billion-a-year electricity industry"). That is particularly so because State regulators, in zealously seeking to implement PURPA, often have improperly or erroneously set QF rates above the federal ceiling — as did the Board here. *See Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n*, 470 U.S. 1075, 1076-78 (1985) (White, J., dissenting) (noting that a "substantial" federal question is raised because at least 11 States "have authorized or required payments to [QFs] in excess of avoided cost"); *Surplus Electricity*, at A8.

FERC has looked to the State utility commissioners to help solve this dilemma. Recently, it confirmed that the States' role under PURPA is "to determine the specific parameters of individual QF power purchase agreements" and "whether the particular facts applicable to an individual QF necessitate modifications of . . . the QF's contract." *West Penn Power Co.*, Docket No. EL95-30-000, slip op. at 21 (May 8, 1995) (hereinafter, "*West Penn*"). Indeed, FERC is encouraging State commissions to do exactly what the Board did here — push utilities and QFs to "make every attempt to buy out (or buy down) [overpriced QF] contract[s]." *Id.* at 26. In fact, at least before the Opinion was issued, State agencies *were* experimenting with a variety of potential approaches to the problems posed by competition and overpriced QF contracts. *See, e.g.*, Agis Salpukas, *Maine Helps Utility Buy Power Plant*, N.Y. Times, Nov. 26, 1994, at 41 (Maine created a public fund from which a utility borrowed money to buy out an overpriced QF contract); Agis Salpukas, *Utilities See Costly Time Warp in '78 Law*, N.Y. Times, Oct. 5, 1994, at D15 ("State regulators around the country are trying to deal with [PURPA's costly] polic[ies]").

By expanding PURPA's preemptive scope, the Opinion will hamper, if not terminate, State efforts to administer PURPA in the face of the movement toward deregulation. At the least, the New Jersey Board's constructive approach, through the Towner Order, has been derailed. Such a "controversial" decision respecting federal law merits this

Court's scrutiny. *See* Mary O'Driscoll, *Utilities Float PURPA Repeal Legislation*, The Energy Daily, Mar. 27, 1995.

Important issues of federalism also are at stake. It cannot be gainsaid that New Jersey's regulation of its public utilities and their rates has been, and continues to be, of unique State concern. *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) ("the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States"); *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (the States have a "traditional responsibility in the field of regulating electric utilities for determining questions of need, reliability, cost, and other related state concerns"). The Opinion abrogates the States' fundamental right to regulate utilities, including the prices they charge consumers — which right PURPA respects and preserves.

Finally, this case is about the sanctity of contract. JCP&L and Freehold bargained for, and the Board approved, a "regulatory out" provision in the PPA in order to allocate to Freehold the risk that the Board or FERC might someday impair JCP&L's ability to pass through to its customers all of the costs associated with the PPA. Such clauses are not uncommon, and the lending and investment communities rely on the protections they afford to utilities and their shareholders. *See* Standard & Poor's CreditWeek, May 27, 1991, at 18 ("if a currently economic project becomes uneconomic over time, a [State] commission still has the authority to deny cost recovery at some point in the future if the purchasing utility has negotiated a . . . so-called 'regulatory out' clause"). Both the Board and FERC (in its *amicus* submission to the Third Circuit) recognized that JCP&L's rights under the "regulatory out" clause had to be determined under New Jersey law on an appropriate evidentiary record. The Court of Appeals, despite recognizing that its "task [was] not to examine the merits underlying the controversy . . . over . . . the PPA" (A-20) and that "Freehold [had] agreed to submit [such] disputes" to the Board (A-14), went on to construe the PPA, without *any* record, so as

to render the "regulatory out" clause nugatory.[10] In that additional respect, the Opinion will have severe and widespread ramifications.

2. The Third Circuit overstated dramatically the preemptive effect of PURPA § 210(e), thus disregarding the statute Congress wrote and this Court's applicable decisions

The Court of Appeals declared an exceptional, and exceptionally broad, rule of preemption under PURPA § 210(e) — that once a State commission has approved a power purchase agreement between a QF and a utility, it may never order the parties to attempt a consensual restructuring of the contract, reconsider its own approval order, *or* deny the utility the right to pass on to its customers the rates charged by the QF (App. A-28 - A-29). The Court concluded that *any* such action constitutes "utility-type" regulation of the QF — even if the purpose of the subsequent review is to correct a conceded violation of PURPA § 210(b).

In reaching these conclusions, the Court of Appeals simply blinded itself to the relevant facts. Among other things, the Court did not even analyze whether the then-ongoing Board proceeding was conducted under the auspices of State law respecting the rates or organization of electric utilities or involved scrutiny of Freehold akin to the invasive inquiry applied to public utilities. Similarly, the Court failed to consider the continuing nature of the States' implementation obligation (*FERC Analysis*, 45 Fed. Reg. at 12,231) and the Board's effort to satisfy that duty through the Towner Order. Nor did the Court explain how an investigation of *JCP&L*'s avoided cost

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[10] The Court first declared that the "regulatory out" clause unambiguously "describes what would happen in the event that during the 20-year contract term JCP&L should *for any reason* lose its right to pass costs on to its ratepayers" (App. A-28) (emphasis added). Inexplicably, this eminently correct reading was immediately rescinded; without any reference to contract language, the panel determined that only a "change in the governing law" could constitute sufficient "reason" for the Board to protect JCP&L's customers from Freehold's excessive prices (*id.*).

in a proceeding commenced by Freehold's Petition can be said to impose *on Freehold* "State law . . . respecting . . . the financial and organizational regulation of electric utilities."[11]

Had the Court conducted the appropriate inquiry, it undoubtedly would have concluded that nothing in the Board proceeding amounted to "utility-type" regulation. The Board did not subject Freehold to cost of service regulation; it did not apply to this QF *any* of the burdensome financial and organizational requirements associated with New Jersey's regulation of public utilities. *See In re Petition of Jersey Central Power & Light Co.*, 85 N.J. 520, 529, 428 A.2d 498, 502 (1981) ("A rate hearing [for a public utility] involves (a) the determination of the value of utility property (rate base), (b) an examination of utility expenses, and (c) the fixing of a fair rate of return to investors"); N.J. Stat. Ann. 48:2-1, *et seq.* (West 1994). *See generally* Charles F. Phillips, Jr., *The Regulation of Public Utilities* 171-72 (3d ed. 1993). Indeed, the Court's flip conclusion that the Board's attempt to adjudicate the proceeding commenced by Freehold constituted "utility-type" regulation directly conflicts with the decisions in *Bristol Energy Corp. v. New Hampshire Pub. Utils. Comm'n*, 13 F.3d 471, 475 (1st Cir. 1994) (a State commission's concededly intrusive request for financial information from a QF is not "utility-type" regulation), and *Independent Energy Producers Ass'n, Inc. v. California Pub. Utils. Comm'n*, 36 F.3d 848, 859 (9th Cir. 1994) ("*Independent Energy*") (States are entitled to monitor QF status by requiring QFs to submit data as part of their "broad ratemaking authority" under PURPA).

To the contrary, the Board's hearings on Freehold's Petition (and JCP&L's counterclaim) constituted a continuation of its PURPA implementation. New Jersey's 1981 case-by-case implementation plan governed Freehold's rates under the

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[11] On the facts of this case, we also do not know how the Board's potential determination to disallow JCP&L's pass through to its customers of Freehold's prices — a decision that could be rendered without any scrutiny of Freehold's rates or organization and in a proceeding to which Freehold was not a party — also would be preempted by § 210(e).

instant PPA because Freehold successfully "grandfathered" its way out of the SOS, thus ensuring that it would not have to competitively bid for a contract with JCP&L. Under that regime, and under applicable New Jersey law, the Board's approval of contracts between QFs and utilities was subject to subsequent modification or revocation. *See* N.J. Stat. Ann. 48:2-40 (West 1994); *Township of Deptford v. Woodbury Terrace Sewerage Corp.*, 54 N.J. 418, 425 (1969). Moreover, the Towner Order — which was the immediate genesis of Freehold's Petition to the Board — continued and refined New Jersey's implementation scheme. In all respects, the Board's effort to adjudicate a dispute between Freehold and JCP&L, first by encouraging the renegotiation of the rates in the PPA and then by commencing a proceeding to reconsider its Approval Order, related directly to its implementation of FERC's rules under § 210(a). *See West Penn*, slip op. at 26.

The panel's ruling is all the more startling when viewed from a broader perspective. Congress expressed its desire *not* to put State commissions out of business where QFs are concerned.[12] Congress granted QFs protection only from "laws and regulations respecting the rates, or . . . the financial or organizational regulation[] of electric utilities." PURPA § 210(e). The Conferees explained that QFs should be spared *only* from "the type of examination that is traditionally given to electric utility rate applications to determine what is the just and reasonable rate that they should receive for their electric power." H.R. Rep. No. 95-1750, 95th Cong., 2d Sess. 97 (1978), *reprinted in* 1978

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[12] *See* 123 Cong. Rec. 32,394 (1977) (Sen. Domenici: "So the committee, by a rather compelling majority, concluded that, whatever we do, we did not want to preempt and dictate to the ratemaking commissions in the country"). Numerous other statements in the relevant legislative history establish Congress's recognition of the traditional role of the States in electric utility regulation and its desire not to infringe upon or impair that State prerogative. *See* 124 Cong. Rec. 34,558 (1978) (Sen. Jackson: "[T]he essential feature of the conference agreement is the limited nature of the authority granted to the FERC"); 123 Cong. Rec. 32,403 (1977) (Sen. Drukin: "[I] do not want to abrogate State law with respect to the regulation of utilities").

U.S.C.C.A.N. 7797, 7831. While QFs would not suffer "the *same* examination as are utility rate applications," the Legislature envisioned that they would be regulated in "a less burdensome manner." *Id.* at 7832 (emphasis added)[13]; *see Staff Paper Discussing Commission Responsibilities to Establish Rules Regarding Rates and Exemptions for Qualifying Cogeneration and Small Power Production Facilities Pursuant to Section 210 of the Public Utility Regulatory Policies Act of 1978*, 44 Fed. Reg. 38,863, 38,865 (July 3, 1978) (hereinafter, "*Staff Paper*") (the "intent of Congress [is] that QFs not be subjected to the *same* scrutiny and organizational requirements as utilities") (emphasis added).

FERC has announced that § 210(e) "is intended to exempt qualifying facilities from the cost-of-service regulation by which electric utilities traditionally have been regulated." *FERC Analysis*, 45 Fed. Reg. at 12,222.[14] FERC also has stated that the States "will carry out day-to-day regulation of" sales involving cogenerators. *Staff Paper*, 44 Fed. Reg. at 38,864; *see also FERC Analysis*, 45 Fed. Reg. at 12233 (the QF exemption is "not intended to divest a State regulatory agency of its authority under State law to review contracts for purchases as part of its regulation of electric utilities"). Indeed, in a series of recent decisions, FERC has confirmed the States' near-plenary responsibilities in this area, including the authority to determine "whether the particular facts . . .

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[13] Given the importance of context, it should be noted that the Conferees immediately followed this discussion with a reminder — overlooked by the Third Circuit — that there was a strict "upper limit" on the price a QF could charge a utility: "the utility would not be required to purchase electric energy from a [QF] . . . at a rate which exceeds the lower of . . . a rate which is just and reasonable to consumers of the utility, in the public interest, and non-discriminatory, or the incremental cost of alternate electric energy." *Id.*

[14] FERC's only regulation on this point merely parrots the statute, exempting QFs "from State law or regulation respecting: (i) The rates of electric utilities; and (ii) The financial and organizational regulation of electric utilities." 18 C.F.R. § 292.602(c).

necessitate modifications . . . of the QF's contract." *West Penn*, slip op. at 21.[15]

In *FERC v. Mississippi*, this Court expounded on the degree to which "Congress intended to defer to state prerogatives — and expertise — in declining to pre-empt the utilities field entirely." 456 U.S. at 765 n.29. Having noted that the statute and the regulations "afford state regulatory authorities . . . latitude in determining the manner in which the regulations are to be implemented," *id.* at 751, this Court concluded that Congress had intended to impose "limited federal regulation . . . of relationships between cogenerators and electric utilities." *Id.* at 758. Among the core principles enunciated by Congress is the mandate that the States "adjudicate disputes arising under the statute." *Id.* at 760.

By raising the QF exemption from "*certain* state and federal laws" to talismanic status, the Third Circuit panel stood the statute on its head. It foreclosed the Board's attempt to reassess its order approving the PPA in light of, *inter alia*, PURPA's QF rate requirements. It thus preempted the very type of State experimentation, case-by-case implementation, and dispute adjudication that Congress intended to encourage, if not command. It also precluded the New Jersey Board — and, presumably, other State commissions — from accepting FERC's invitation to facilitate the buy-out or cancellation of overpriced QF contracts. *West Penn*, slip op. at 26. These

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[15] *See, e.g., West Penn*, slip op. at 21 ("It is up to the States . . . to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law"); *Connecticut Light and Power Co.*, 70 FERC ¶ 61,012, at 61,029 (1995) (whether rates "do or do not exceed avoided cost (which is determined by the state) is a matter . . . best left to the appropriate state or judicial forum"). *See also Independent Energy*, 36 F.3d at 856 ("[T]he [S]tates play the primary role in calculating avoided costs and in overseeing the contractual relationship between QFs and utilities operating under regulations promulgated by . . . FERC"). FERC also has declared that the States have "opportunity for experimentation" to develop answers to "difficult rate principles" and can conduct such experiments "on a case-by-case basis." *FERC Analysis*, 45 Fed. Reg. at 12,231.

were errors of significant magnitude, which this Court should review. *See Blue Cross*, 115 S. Ct. at 1682 (reversing a pre-emption ruling because a statute's preemptive reach should not be read so broadly as to leave States without authority to do just what Congress intended them to do).[16]

3. The Third Circuit endorsed a violation of PURPA § 210(b), again in derogation of both the relevant statute and this Court's rulings

The Court of Appeals never considered the pricing implications of its Opinion. It locked in for twenty years QF rates that undeniably are forbidden by PURPA § 210(b) and sentenced JCP&L's ratepayers to subsidize Freehold's operations. The Board's Approval Order obligated JCP&L to pay a rate to Freehold that exceeded by at least $165 million (net present value) JCP&L's avoided cost at the time the PPA became effective. Although the Board later recognized its error and sought to correct it pursuant to a New Jersey statute that vests in the Board the continuing authority to revoke or modify any order made by it, the Third Circuit invoked PURPA § 210(e) to shield the Approval Order from such scrutiny.

The Court's stance on the cost issue flies in the face of the statute, as interpreted by both this Court and FERC. Congress forbade FERC or the States from prescribing QF rates in excess of the utility's avoided cost. PURPA § 210(b); *American Paper Institute, Inc. v. American Elec. Power Serv. Corp.*,

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[16] The panel's error can be explained, but not condoned, by its apparent failure to apply basic — and required — preemption analysis. At the outset, the Court disregarded the "starting presumption that Congress [did] not intend to supplant state law," a particularly critical error given Freehold's assertion that "federal law . . . bar[s] state action in [a] field[] of traditional state regulation." *See Blue Cross*, 115 S. Ct. at 1676. That initial error was compounded when the Court failed to adhere strictly to the restrictive scope of § 210(e)'s language, which expressly preempts only "utility-type" regulation. *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. at 2618 ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted"); *Greenwood v. Trust Co.*, 971 F.2d 818, 821 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993).

461 U.S. at 413 ("PURPA sets full avoided cost as the maximum rate" that may be prescribed); *Connecticut Light and Power Co.*, 70 FERC ¶ 61,012, at 61,027-28. The Board admittedly violated that rule, but later sought to correct its mistake. The Opinion twisted PURPA so as to immunize this violation of one of the statute's core tenets. This is untenable. *See Blue Cross*, 115 S. Ct. at 1682.

4. The Third Circuit effectively vitiated the jurisdictional bar in PURPA § 210(g)

PURPA contains a broad, express limitation on federal court jurisdiction that applies precisely to Freehold's cause of action. PURPA § 210(g)(1) provides that:

> [Federal] [j]udicial review may be obtained respecting any proceeding conducted by a State regulatory authority . . . for purposes of implementing any requirement of a rule under subsection (a) of this section [governing QF regulation and rates] in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title.

The cross-referenced statute, 16 U.S.C. § 2633, states that, with exceptions concededly not applicable here, "no court of the United States shall have jurisdiction over any action arising under any provision of [PURPA]."

The legislative history of 16 U.S.C. § 2633 confirms that Congress intended to impose a broad restriction on access to federal courts: "The jurisdiction of the Federal courts is limited by this section; review and enforcement is primarily in the state courts." H.R. Rep. No. 95-1750, 95th Cong., 2d Sess. 83 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7797, 7817. FERC has agreed: "Section 210(g)(1) of PURPA provides for judicial review, generally to be pursued in a State court forum, respecting any proceeding to be conducted by a State regulatory authority." *See Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304,

at 61,645 (1983); *see id.* at 61,647 n.2 ("The Congress has provided not only for private causes of action in State courts . . . but also provided that [FERC] may serve as a forum for review and enforcement").[17] *See FERC v. Mississippi*, 456 U.S. at 761 (noting "the congressional determination that the federal rights granted by PURPA can appropriately be enforced through state adjudicatory machinery").

Moreover, any judicial interpretation of PURPA's jurisdictional restriction must be guided by the "fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). Indeed, this Court has construed broadly statutes that restrict federal jurisdiction, particularly where, as here, federal jurisdiction is sought for the purpose of enjoining or otherwise interfering with State proceedings. *See, e.g., Rosewell v.*

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[17] Similar comments appear in FERC's preamble to its regulations. Discussing § 210(g), FERC asserted that:

> persons can bring an action in State court to require the State regulatory authorities . . . to implement these regulations. . . . [T]he Commission believes that review and enforcement of implementation under section 210 of PURPA can consist not only of review and enforcement as to whether the State regulatory authority . . . has conducted the initial implementation properly. . . . It can also consist of review and enforcement of the application by a State regulatory authority . . . , on a case-by-case basis, of its regulations or of any other provision it may have adopted to implement the Commission's rules.

FERC Analysis, 45 Fed. Reg. at 12,231. *See also Snow Mountain Pine Co. v. CP Nat'l Corp.*, 30 FERC ¶ 61,293, at 61,589 (1985) ("As the commission has previously noted, complaints regarding an alleged refusal to purchase power from a qualifying facility and the rates for such purchases are matters properly brought in a State forum"). Indeed, FERC pointedly drew a "distinction" between challenges to the implementation activities of federal agencies and challenges to State "case-by-case" implementation — the former may be brought in federal court, the latter may not. *FERC Analysis*, 45 Fed. Reg. at 12,231.

La Salle Nat'l Bank, 450 U.S. 503, 522 (1981); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 379-80 (1959) (noting the "deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes").

The only two other federal courts to address PURPA § 210(g) applied that provision in a manner consistent with its intent to severely restrict federal jurisdiction. In *Bristol Energy Corp. v. New Hampshire Pub. Utils. Comm'n*, 13 F.3d at 474 & n.5, the First Circuit announced the appropriate rule — that cases "*involving* rules implementing" PURPA § 210(a) cannot be heard in the federal courts — but concluded that § 210(g)'s jurisdictional bar did not apply because all parties agreed that rate-related rules were "not at issue." (Emphasis added.) *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345, 1372-74 (N.D. Ga. 1986), *aff'd*, 844 F.2d 1538 (11th Cir. 1988), recognized that "Congress . . . provided for enforcement of . . . [PURPA's] obligations pursuant to a set of comprehensive and complicated statutory provisions that substantially limit federal jurisdiction" and dismissed a challenge to the application of a PURPA implementation plan. Freehold's claim "involves" § 210(a); it is a challenge to the Board's case-by-case application of its PURPA implementation plan, particularly as it relates to the setting, and locking in, of QF rates. By concluding that there is federal jurisdiction to resolve that claim, the Opinion conflicts with both *Bristol* and *Greensboro*.

In short, the Court of Appeals federalized the adjudication of QF/utility disputes and defeated Congress's effort to prevent that result. The Third Circuit erroneously concluded that PURPA § 210(g) is "limited in scope" (App. A-8). It declared a rule that any QF that "essentially" characterizes its claim as arising under PURPA § 210(e) may access the federal courts (*id.*). That is so even though *both* the QF and the Court must rely extensively on §§ 210(a), (b), and (f) — *i.e.*, PURPA's "overall scheme" — to support their ultimate preemption analysis. This situation warrants intervention by this Court.

CONCLUSION

This petition for a writ of certiorari should be granted.

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